UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	
Plaintiffs,	Civ. No. 16-2255 (CRC)
v.	
FEDERAL ELECTION COMMISSION,	
Defendant,	
AMERICAN ACTION NETWORK,	
Intervenor-Defendant.	

PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

The Plaintiffs, Citizens for Responsibility and Ethics in Washington ("CREW") and Melanie Sloan, by their undersigned counsel, respectfully move this Court, pursuant to Federal Rule of Civil Procedure 56, for summary judgment declaring that the failure of the Federal Election Commission ("FEC") to find "reason to believe" that American Action Network ("AAN") violated the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30101 *et seq.*, was contrary to law, and declaring the failure of the FEC to act on Plaintiffs' complaint against Americans for Job Security ("AJS") for violating the FECA was contrary to law. Plaintiffs further seek an order directing the FEC to conform with such declaration within 30 days.

A judgment that the FEC's dismissal of AAN is contrary to law is warranted because the FEC's dismissal ignores this Court's prior Order by relying on impermissible interpretations of law. The dismissal further "blinks reality" by applying an arbitrary and capricious analysis that pays no heed to relevant facts and is not based in any assessment by the FEC's Office of General

Counsel, relying instead on AAN's submission. [redacted] The FEC's actions and inaction harm voters, including Ms. Sloan, by denying them information vital to our democracy and harm CREW by denying it information vital to its work combatting corruption. Accordingly, Plaintiffs respectfully request this Court grant summary judgment and find that the controlling commissioners' conclusions and lethargy are contrary to law, in violation of 52 U.S.C. § 30109(a)(8)(C).

Support for this motion is set forth in the accompanying Memorandum of Points and Authorities in Support of Plaintiffs' Cross-Motion for Summary Judgment and in Opposition to the Federal Election Commission's and American Action Network's Motions for Summary Judgment, the accompanying Declaration of Stuart C. McPhail, and the joint appendix containing copies of those portions of the administrative record that are cited or otherwise relied upon, to be filed no later than January 15, 2018. Plaintiffs' requested relief is set forth in the accompanying Proposed Order. Plaintiffs respectfully request oral argument on this motion.

Respectfully submitted,

September 26, 2017

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE FEDERAL ELECTION COMMISSION'S AND AMERICAN ACTION NETWORK'S MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

"[B]links reality." Those are the words this Court used to describe the conclusion of three commissioners of the Federal Election Commission ("FEC" or "Commission") that "many of the ads considered by the Commissioners in this case were not designed to influence the election or defeat of a particular candidate in an ongoing race." *CREW v. FEC* ("*CREW I*"), 209 F. Supp. 3d 77, 93 (D.D.C. 2016) (the "September 2016 Judgment"). Despite the Court's admonition, those same three commissioners reached the same reality-blinking conclusion on remand, once again finding that most of the ads considered were not designed to influence elections. While this Court declined to address the legality of that conclusion in the prior case, *see* Mem. Op. & Order 5, *CREW v. FEC*, 14-cv-1419 (D.D.C. Apr. 6, 2017) ("OTSC Order"), "the Court may hear Plaintiffs' newly developed arguments" here, *id.*

Plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW") and Melanie Sloan (together "Plaintiffs") come before this Court to ask it to once again correct the controlling commissioners' erroneous understanding of the First Amendment and of judicial precedent starting with *Buckley v. Valeo*, 424 U.S. 1 (1976). The controlling commissioners relied on the same impermissible interpretations of law, and new arbitrary and capricious analyses, to once against dismiss Plaintiffs' complaint against American Action Network ("AAN"). Accordingly, despite the FEC's and AAN's meritless arguments to the contrary, that dismissal is again contrary to law.

Accordingly, Plaintiffs respectfully request this Court deny the FEC's and AAN's motions for summary judgment and grant summary judgment to Plaintiffs, and find that the controlling commissioners' conclusions and lethargy are contrary to law, in violation of the FECA.

STATEMENT OF FACTS

I. Statutory and Regulatory Background

The FECA and implementing FEC regulations impose disclosure obligations on organizations that engage in sufficient politicking. These organizations, called political committees, must register with the FEC and file periodic reports disclosing, among other things, their contributors. 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. § 104.3(a). As "straightforwardly spelled out in the FECA," an organization must register as a political committee if accepts contributions or "expend[s] more than $1,000 in a calendar year for the purposes of influencing a federal election." *CREW I*, 209 F. Supp. 3d at 82 (discussing 52 U.S.C. § 30101(4)(A)). Any organization that does so is a political committee under the statute and must register and report.

In *Buckley*, however, the Supreme Court carved out from FECA's statutory reporting

requirement organizations that meet the statutory thresholds but lack the "major purpose" to "nominat[e] or elect[] . . . candidate[s]," and which were not under the control of a candidate. 424 U.S. at 79. The Court later specified that an organization lacks the "major purpose" to influence elections if its electoral activity is insufficiently "extensive." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986). Although neither the courts nor the FEC have definitively decided the threshold for insufficient spending, organizations must at least devote more than half of their spending to non-political activities to be excused from reporting. *See Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 555–57 (4th Cir. 2012) (finding political committee statute does not depend on whether "campaign-related speech amounts to 50% of all expenditures"); FEC, Political Committee Status, 72 Fed. Reg. 5595, 5605 (Feb. 7, 2007) (noting group devoting at least "50-75%" of spending to campaign activity qualified as political committee).[1] In other words, after *Buckley*, the FEC would not only verify that a group spent or received sufficient sums to qualify as a political committee under the statute, but would also determine whether the group spent sufficiently extensive sums on non-political activities to justify excusing the groups from comprehensive disclosure because disclosure would not "fulfill the purposes of the Act." *Buckley*, 424 U.S. at 79.

The FECA does not define what activities are so non-political as to excuse reporting, but the statute regulates two forms of communications due to their close relation to elections and the public's interest in disclosure about them. *See McConnell v. FEC*, 540 U.S. 93, 196 (2003) (noting disclosure of funding behind election-related communications "provid[es] the electorate

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[1] In *CREW I*, this Court noted that it was "far from apparent that the Commissioners did apply any such 50%-plus spending threshold." *CREW I*, 209 F. Supp. 3d at 94. Nonetheless, it found "[a] reasonable application of a 50%-plus rule would not appear to be arbitrary and capricious." *Id.* at 95.

with information, deter[s] actual corruption and avoid[s] any appearance thereof, and gather[s] the data necessary to enforce more substantive electioneering restrictions").

First, the FECA requires those making independent expenditures to file reports with the FEC. 52 U.S.C. § 30104(c); 11 C.F.R. § 109.10. An independent expenditure is defined by the content of the communication: they are ads that contain "express advocacy" such as a call to "vote for" a candidate, or words that "in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)." 11 C.F.R. § 100.22; *see also* 52 U.S.C. § 30101(17).

Second, the FECA requires those making electioneering communications to file similar reports with the FEC. 52 U.S.C. § 30104(f). Electioneering communications are broadcast ads that air shortly before an election, clearly identify a candidate in that election, and target a large segment of the relevant electorate. *Id.*; 11 C.F.R. § 100.29. This category is narrowly focused on election-related communications, excluding ads distributed to less than 50,000 people, Internet and print communications, and "news stor[ies], commentar[ies], and editorial[s]." 11 C.F.R. § 100.29(b), (c). Congress created this category of communications when it realized that individuals were "evading" the law for independent expenditures by avoiding the "magic words" that would trigger regulation, *McConnell*, 540 U.S. at 126–31, but still airing ads shortly before elections that "constitute[d] campaigning every bit as much as . . . any ad currently considered to be express advocacy and therefore subject to Federal Election laws," 147 Cong. Rec. S2455 (daily ed. Mar. 19, 2001) (Sen. Snowe). The Supreme Court found that "the important state interests that prompted the *Buckley* Court to uphold the FECA's disclosure requirements" applicable to those engaged in independent expenditures, not excluding the political committee reporting provisions, "apply in full to . . . to the entire range of 'electioneering

communications.'" *McConnell*, 540 U.S. at 196 (discussing 2 U.S.C. § 304, codified as amended at 52 U.S.C. § 30104, including the political committee reporting obligations).

While the FECA places preliminary responsibility for enforcing federal campaign finance laws with the FEC, third parties may file a complaint with the FEC if they identify a violation of the statute. 52 U.S.C. § 30109(a)(1). This commences a multistep process within the FEC. After a response from the alleged violators and a report from the FEC's Office of General Counsel ("OGC"), the six commissioners of the FEC then vote on whether they find "reason to believe" the FECA has been violated. *Id.* § 30109(a)(2). If four commissioners find reason to believe a violation may have occurred, the OGC must investigate "expeditiously" and make a recommendation whether there is probable cause. *Id.* §§ 30107(a)(9), 30109(a)(2), (3). If four commissioners find probable cause, the FEC must then seek conciliation with the respondents; if the FEC is unable to reach a conciliation agreement, the FEC may pursue a civil action in court. *Id.* at § 30109(a)(4)(A), (6)(A).

If the FEC does not pursue enforcement or fails to timely act on the complaint, the FECA provides that the complainant may, no earlier than 120 days from the date the complaint was filed, seek judicial review of the FEC's action (or inaction). 52 U.S.C. § 30109(a)(8)(A). Thereafter, if a court finds the dismissal or failure to act permits activity "contrary to law" and the FEC fails to conform with that declaration within 30 days of the judgment, the FECA empowers the complainant to "bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint." *Id.* § 30109(a)(8)(C).

II. Procedural History

On March 8, 2012, Plaintiffs filed a complaint with the FEC alleging AJS had failed to register and report as a political committee in violation of the FECA, even though it had engaged

in extensive electioneering. AR 1–13. Shortly thereafter, Plaintiffs filed a similar complaint against AAN, also alleging that group had failed to register and report as political committee in violation of the FECA, despite its extensive electioneering. AR 1480–87.

A. AAN's and AJS's Electoral Activities and FEC's First Dismissal

Each organization had spent millions of dollars to influence federal elections in the 2010 election cycle. For its part, "AJS spent approximately $4.9 million on express advocacy advertising and an additional $4.5 million on electioneering communications, meaning that over three-fourths of its spending was in some way tied to elections." *CREW I*, 209 F. Supp. 3d at 83; AR 1393–94. For example, one of the electioneering communications AJS ran supported Massachusetts Senate candidate Scott Brown, praising the actions he would take to "protect Medicare," not "raise taxes," and to "listen to the people, not the lobbyists"—actions he could only take if voters elected him to office. AR 5, 1404. AJS ran another electioneering communication praising Colorado Senate candidate Ken Buck for his plan to "get Colorado back to work" if viewers elected him. AR 1428; *see also* 1404–07.

With respect to AAN, "the majority of its spending throughout the period in question—mid-2009 through mid-2011—was on election-related advertising." *CREW I*, 209 F. Supp. 3d at 83. For example, AAN spent $1,065,000 on three versions of the following advertisement:

> [On-screen text:] Congress doesn't want you to read this. Just like [candidate]. [Candidate] & Nancy Pelosi rammed through government healthcare. Without Congress reading all the details. $500 billion in Medicare cuts. Free healthcare for illegal immigrants. Even Viagra for convicted sex offenders. So tell [candidate] to read this: In November, Fix the healthcare mess Congress made.

Id. at 80; AR 1722. A similar ad accused two other candidates of supporting "Viagra for rapists." AR 1652. Another ad accused Rep. Stephanie Herseth Sandlin of providing "health care for illegal immigrants." AR 1649. Nearly all of AAN's ads informed viewers that they

should register their disagreement "in November" when the identified candidates were up for election. AR 1649–55. Over the two years from mid-2009 to mid-2011, AAN spent approximately $4 million on independent expenditures and an additional $13.7 million on electioneering communications. AR 1638. "In other words, well over half of its spending during the period was election-related." *CREW I*, 209 F. Supp. 3d at 83.

After receiving Plaintiffs' complaints against both AJS and AAN, the OGC recommended finding reason to believe that both organizations were political committees subject to the FECA and that they failed to comply with FECA's registration and reporting requirements. AR 1411, 1569. In June 2014, despite the OGC's analysis, three commissioners voted not to proceed against AJS and AAN, causing the commission to deadlock. While these three commissioners recognized that both AAN and AJS qualified as political committees under the FECA, they interpreted the First Amendment and *Buckley*'s "major purpose" carve out to excuse AAN and AJS from their statutory obligations. AR 1434-35, 1455, 1686, 1706. Relying on *FEC v. Wisconsin Right to Life, Inc. (WRTL II)*, 551 U.S. 449 (2007), the three commissioners stated that the FEC was constitutionally required to treat all non-express advocacy communications, including electioneering communications, as unrelated to elections and thus indicative of a lack of the required "major purpose." AR 1701. Accordingly, the controlling commissioners counted every dollar the groups spent on electioneering communications as evidence supporting the conclusion that the groups lacked a major purpose to influence elections. AR 1709. In other words, the FEC's controlling commissioners found that these groups were *excused* from reporting as political committees *because* they spent significant sums on electioneering communications.

B. *CREW I*

Plaintiffs filed suit against the FEC on August 20, 2014. On September 19, 2016, the Court granted summary judgment to Plaintiffs, finding both the dismissals of the AAN and AJS complaints were contrary to law. *CREW I*, 209 F. Supp. 3d at 81. In relevant part, the Court first found that Plaintiffs' "primary challenge regards the FEC's understanding of the constitutional dimensions of a Supreme Court-authored test which has itself developed to avoid potential constitutional infirmities," and thus, "[u]nder such circumstances," the deference afforded under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), "can have no sound place in evaluating whether an FEC interpretation is 'contrary to law.'" *Id.* at 86.

Next, the Court found that the controlling commissioner's reliance on *WRTL II* was erroneous because "the overwhelming weight of legal authority, beginning with the Supreme Court itself, has concluded that the *WRTL II* framework is not properly applied in the context of less restrictive *disclosure* requirements" like the FECA's political committee rules. *Id.* at 89. In fact, "*WRTL II*'s constitutional division between express advocacy and issue speech is simply inapposite in the disclosure context." *Id.* at 90. Indeed, the Court found that "*many* or even *most* electioneering communications indicate a campaign-related purpose," justifying disclosure despite the ads' lack of express advocacy. *Id.* at 93. Because the controlling commissioners relied on inapposite authority, "the Court ha[d] little trouble" concluding that the controlling commissioners' analysis was erroneous, and thus their use of it to treat all non-express advocacy speech as non-political was contrary to law. *Id.* at 92. Finding that the issue resolved this matter, the Court did not address the further issue of whether a group's dissemination of an electioneering communication would ever justify denying voters of information about the group's contributors to which the FECA legally entitles them. *Id.* at 93. In addition, the Court

ruled that the appropriate period for comparison was the group's expenditures within the "calendar year." *Id.* at 94. Accordingly, the Court reversed the dismissals and remanded back to the FEC, directing it to "conform with [the] declaration within 30 days." *Id.* at 95.

C. FEC's Actions on Remand

On October 19, 2016, thirty days after the Court's order, the FEC notified Plaintiffs that it had once against dismissed Plaintiffs' complaint against AAN. AR 1783. The commissioners had not received—and thus did not rely on—any analysis from the OGC on how to apply *Buckley*'s major purpose test in light of the Court's September 2016 Judgment. Rather, they relied solely on an analysis from AAN. AR 1734–59. AAN suggested that the commissioners look to newspaper articles not in the record to determine that its advertisements addressed "prominent public policy debates when they were aired in the fall of 2010." AR 1742–43. AAN argued that its ads' request to viewers to "contact their representatives about [those] issues" rendered the ads non-electoral. AR 1745, 1748; *see also* AR 1751.

Based on AAN's selective analysis, the same three commissioners who voted to excuse AAN from following the law the first time once again voted to excuse AAN from reporting. Despite this Court's admonition that it would blink reality to conclude that many of the ads the groups ran were not intended to influence elections, the controlling commissioners once again determined that nearly all of AAN's electioneering communications—representing over 80% of the funds AAN spent on such ads—were not election focused. AR 1779. Among the ads deemed non-political was AAN's "Read This" ad that the Court quoted in full in its September 2016 Judgment. *CREW I*, 209 F. Supp. 3d at 80. They also deemed non-political AAN's "Skype" ad, which like AAN's "Read This" ad accused candidates who were sitting members of Congress of voting to support "Viagra for rapists." AR 1776. Similarly deemed non-political

was AAN's ad revealingly titled "*Quit* Critz," with then-sitting Rep. Mark Critz (D-PA) the target of the ad. AR 1770–71. Accordingly, they treated these ads as reasons to exclude AAN from the political committee reporting obligations under FECA. AR 1779.

While complying with the bare minimum required by the September 2016 Judgment by treating at least a small handful of AAN's ads as electorally motivated, the controlling commissioners concocted a new test that still allowed them to reach their predetermined decision to excuse AAN from the law. The new test looked at the ad's "specific language" to see if it contained express advocacy, examined whether the ad "focuse[d] on issues important to the group or merely on the candidate referenced in the ad," considered a limited subset of context "to provide a better understanding of the message," and ascertained whether the ad included a "call to action . . . relat[ing] to the speaker's agenda or, rather, to the election or defeat of federal candidates." AR 1767–68. The test essentially echoed AAN's submission by looking to facts AAN identified as relevant to showing its ads were non-political. The sole authority cited for this test was a portion of *McConnell* in which the Court found an ad discussing candidate Bill Yellowtail was electoral. AR 1768. The controlling commissioners omitted, however, the portions of the Yellowtail ad that discussed policy and contained a call to action related to the speaker's issue agenda. *Id.*

D. The Court finds the FEC Conformed Without Deciding Whether Dismissal was "Contrary to Law"

On November 14, 2016, on the same day Plaintiffs filed the instant suit, Plaintiffs filed a motion for the Court to issue a show cause order to the FEC. Plaintiffs asked the Court to

require the FEC to show cause why it should not be found to have failed to conform with the Court's September 2016 Judgment. Pls.' Mot. for an Order to Def. FEC to Show Cause, *CREW v. FEC*, No. 14-cv-1419 (CRC) (D.D.C. Nov. 14, 2016).

On April 6, 2017, the Court denied Plaintiffs' request for an order to show cause. OTSC Order 6. The Court found that the issue presented in a post-judgment enforcement action was a narrow one: only whether the "administrative agency plainly neglect[ed] the terms of a mandate" and not whether it was otherwise lawful. *Id.* at 4 (citing *Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24, 30 (D.C. Cir. 2005) (finding enforcement action "not the proper means" to challenge legality of agency action on remand); *Int'l Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984)); *see also Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (agency must violate "clear and unambiguous" directive of court order for post-judgment relief; insufficient to commit legal error identified in prior judgment). The Court found that, irrespective of its various legal findings, the sole directive contained in the September 2016 Judgment was for the FEC to reopen the matters and to cease excluding all non-express advocacy "on a categorical basis." OTSC Order 5. The Court accordingly found that the FEC had conformed with the Court's judgment. *Id.* at 6. With respect to Plaintiffs' arguments about other legal errors, the Court found that "they are properly

taken up in a separate suit" such as this one. *Id.* at 5.

[2]

III. The Continued Growth of Dark Money

As discussed in the briefing in the earlier case, AAN and AJS are not unique entities in the campaign finance world. They represent but two examples of a type of organization that has become ubiquitous—dark money nonprofits. These groups are designed to hide the identities of contributors, while laundering money through a web of faceless and interchangeable groups to ensure voters are denied knowledge about who is funding elections and who will be calling for favors from their elected officials.

These groups, which evade federal laws and undermine the vital need for voters to know "who is speaking about a candidate shortly before an election," *CREW I*, 209 F. Supp. 3d at 90 (quoting *Citizens United v. FEC*, 558 U.S. 310, 369 (2010)), continue to gain influence in our political system. For example, in the 2010 election cycle, the year at issue in this case, dark money organizations spent approximately $138 million to influence elections. Outside Spending by Nondisclosing Groups, Cycle Totals, Excluding Party Committees, OPENSECRETS.ORG, http://bit.ly/2gNn9aT. By the 2012 cycle, the first presidential election after *Citizens United*, that number ballooned to $311 million. *Id.* In the 2014 cycle, which did not include a presidential election, dark money spending still amounted to $177 million. *Id.* And in the 2016 cycle, which involved a number of electoral anomalies, dark money still accounted for about $183 million. *Id.* While dark money spending did not reach 2012 levels, nearly all of the drop off can be attributed to the presidential race being less attractive to big-money donors. *Compare* Political Nonprofits: Race, 2016, OPENSECRETS.ORG http://bit.ly/2xOBDLL (showing about $43 million in dark

money spending in 2016 presidential election) *with* Political Nonprofits: Race, 2012, OPENSECRETS.ORG, http://bit.ly/2f3TOWh (dark money spending in 2012 presidential race amounted to about $141 million); *see also* Stuart McPhail, *Publius Inc.: Corporate Abuse of Privacy Protections for Electoral Speech*, 121 Penn. St. L. Rev. 1049, 1053 & n.17 (2017). In contrast to the presidential race, competitive Senate races experienced an approximate 20% increase in dark money spending. *See* McPhail, *Publius Inc.*, 121 Penn. St. L. Rev. at 1053 & n.18 (based on FEC data and races identified as competitive in contemporary reporting by the New York Times).

Nor is there any indication that these trajectories will change. Only months into the 2018 election cycle, already more than $9 million has been spent by dark money organizations without disclosure of their contributors. Outside Spending, OPENSECRETS.ORG. That is more than four times the amount spent by dark money groups at this point in the 2014 election cycle. *Id.*; *see also* Robert Maguire, Dark money, super PAC spending surges ahead of 2018 midterms, OPENSECRETS.ORG (Aug. 25, 2017), http://bit.ly/2eKHddG.

Needless to say, dark money organizations like AAN and AJS are an increasing presence in our elections and their ability to prevent voters from learning who is speaking presents an increasing threat to our democracy.

ARGUMENT

I. Jurisdiction

The action arises under the FECA, 52 U.S.C. § 30101 *et seq.* This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and venue is appropriate under 28 U.S.C. § 1391(c). Plaintiffs have standing pursuant to *FEC v. Akins*, 524 U.S. 11 (1998), because they have not received information to which they are legally entitled under the FECA, *id.* at 21.

II. Standard of Review

A court reviews an FEC dismissal or a failure to act to determine whether it is "contrary to law." 52 U.S.C. § 30109(a)(8)(C). While the ultimate question posed is the same, slightly different standards of review apply to the two situations.

A. Dismissals Contrary to Law

The FEC's dismissal of a case is contrary to law "if (1) the FEC dismissed the complaint as a result of an impermissible interpretation of [law], or (2) if the FEC's dismissal of the complaint, under a permissible interpretation of the [law], was arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986) (internal citations omitted). Where the dismissal results from an FEC deadlock, the statement of reasons of the three commissioners voting against proceeding is the subject of judicial review, even though that statement does not represent that authoritative position of the agency, because it nonetheless explains the failure to enforce. *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987).

1. **De Novo** ***Review of Impermissible Interpretations of Law***

Under the first prong of the analysis, the court looks to see if the FEC's justification for dismissal is "a result of an impermissible interpretation of [law]." *Orloski*, 795 F.2d at 161. Plaintiffs need not identify law compelling an opposite result from that reached by the commissioners; rather, plaintiffs need only identify a legal error in the controlling commissioners' analysis. *See Akins*, 524 U.S. at 25 (finding plaintiffs may bring action to complain that FEC "based its decision upon an improper legal ground"); *CREW I*, 209 F. Supp. 3d at 93 (finding dismissal contrary to law where FEC "based its decision upon an improper legal ground").

In determining whether the FEC's proffered interpretation is "impermissible," a court may provide deference where appropriate under the doctrine in *Chevron*, 467 U.S. 837. However, in this case, *Chevron* deference is unavailable for two reasons. First, *Chevron* deference does not apply to cases, such as this, where the commissioners' interpretation concerns matters over which they do not have special authority or expertise. Second, controlling authority concludes that courts do not extend *Chevron* deference where the commissioners do not represent a majority of the commission, as such decisions lack the force of law.

Unlike cases where the commissioners interpret the FECA or FEC regulations, *Chevron* deference does not extend to interpretations of matters over which the commissioners have no authority, such as the Constitution or judicial precedent. *N.Y. N.Y., LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002) ("We are not obligated to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle." (internal quotation marks omitted)); *Public Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988) ("The federal Judiciary does not, however, owe deference to the Executive Branch's interpretation of the Constitution."); *CREW I*, 209 F. Supp. 3d at 86–87 ("[T]he Court will not afford deference to the FEC's interpretation of judicial precedent defining the protections of the First Amendment and the related contours of *Buckley*'s major purpose test." (citing *Akins v. FEC*, 101 F.3d 731 (D.C. Cir. 1996) (en banc)); c*f. Orloski*, 795 F.2d at 161–62 (applying *Chevron* deference to FEC's interpretation of FECA).

Here, *Chevron* deference is unavailable because the issue on review is same as in *CREW I*: the FEC's interpretation of *Buckley*'s "major purpose" test and that case's progeny. *See* FEC Br. 38–40 (citing *WRTL II*, 551 U.S. at 470 (interpreting First Amendment to bar restraints on corporate and union electioneering communications); *McConnell*, 540 U.S. at 206 (recounting dispute among parties about whether an electioneering communication could lack an

electioneering purpose)); *CREW I*, 209 F. Supp. 3d at 87.[3] Just as before, "major purpose" is not a statutory or regulatory test, but a judicial one. All parties agree that the statutory and regulatory tests for political committee status are satisfied, AR 1401, 1645–66; this case does not require their interpretation. Thus, the only basis for the FEC to exclude AAN from political committee reporting was *Buckley*. The administrative record confirms that the controlling commissioners understood this and once again interpreted the decision based on the Constitution and case law. *See* AR 1765 (attributing major purpose test to *Buckley*; noting that "[i]n analyzing AAN's spending, we used First Amendment jurisprudence and judicial decisions distinguishing campaign speech from issue advocacy ad a guide" and citing *WRTL II* as example); AR 1767–68 (proscribing test as exercise of "evaluating major purpose" under *Buckley*); AR 1772 (finding ads do not "indicat[e] . . . a major purpose to nominate or elect federal candidates"); AR 1774 (same); AR 1776 (same); AR 1779 (noting that "[t]he Supreme Court," not the FECA nor FEC regulations, "has held that the Commission may regulate entities as 'political committees' within the meaning of the Act only if they have as their major purpose the nomination or election of a candidate" and citing *Buckley*, 424 U.S. at 79). Just as before, they found their own idiosyncratic understanding of case law and the Constitution requires understanding *Buckley*'s "major purpose" in a way that not only treats vast swaths of electioneering communications to not indicate a purpose to nominate or elect candidates, but

[3] The FEC asserts that the test is based on the controlling commissioners' "expertise and experience regulating political activities," FEC Br. 33, but cannot cite to a single example of the commissioners discussing that expertise or drawing on any cited experience to explain their proffered test. Of course, that is because the controlling commissioners did not do so. *See* AR 1767–68. The FEC further points to authority discussing the FEC's "adjudicative, case-by-case approach." FEC Br. 32 (citing *Shays v. FEC*, 424 F. Supp. 2d 100 (D.D.C. 2006); Political Committee Status, 72 Fed. Reg. at 5,601. But that merely describes the type of investigation FEC may undertake; it does not justify the FEC's interpretation of *Buckley*'s major purpose test.

rather treats those ads as evidence *against* finding a group has such purpose. Because the question on review here is "what *Buckley* (and subsequent precedent) means," *Chevron* deference is unavailable. *CREW I*, 209 F. Supp. 3d at 87.[4]

Second, where the controlling commissioners do not constitute a majority of the Commission, courts do not owe their statements *Chevron* deference. "[A] statement of reasons [of three commissioners] would not be binding legal precedent or authority for future cases." *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988); *see also* 52 U.S.C. § 30106(c) (four commissioners needed to exercise agency powers). Only agency statements with "force of law" warrant *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 221–23, 233–34 (2001) (finding agency decision has force of law when it binds third parties); *see also Mayo Found. For Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011) (*Chevron* deference only justified where agency issue's decision has "force of law" with "binding" effect); *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1137 (D.C. Cir. 2014) ("[T]he expressly non-precedential nature of the Appeals Office's decision conclusively confirms that the Department was not exercising through the Appeals Office any authority it had

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[4] In *CREW I*, the Court found that *Chevron* deference may be appropriate where the agency action involves "*how Buckley* (and the test it created) should be implemented" rather than "*what Buckley* (and subsequent precedent) means." *Id.* The Court found that the "FEC's choice of relevant timespan for assessing an organization's spending activity, and on the agency's purported 50%-plus spending threshold for finding major purpose based on expenditures" fell into the former category, and thus could receive *Chevron* deference. *Id.* at 87–88 (citing *Shays v. FEC*, 511 F. Supp. 2d 19, 31 (D.D.C. 2007) (finding FEC retained discretion to choose whether to implement *Buckley*'s major purpose test through adjudication or rule making)). Here, the FEC was not engaged in gap-filling necessitated by a judicial decision, nor was it choosing among methods to implement it. Rather, they interpreted what *Buckley* meant by a qualifying "major purpose" and thus what activities would or would not evidence that purpose. It was precisely that type of judgment that the Court previously found did not warrant *Chevron* deference. *CREW I*, 209 F. Supp. 3d at 87.

to make rules carrying the force of law. That is because the decision's 'binding character as a ruling stops short of third parties' and is 'conclusive only as between [the agency] itself and the [petitioner] to whom it was issued.'" (citation omitted)).

In *CREW I*, this Court found that a statement of reasons of three commissioners warrants *Chevron* deference despite the fact that such a statement does not have force of law because the FEC's power to engage in adjudication provided an "indication of comparable congressional intent" to warrant *Chevron* deference. *See CREW I*, 209 F. Supp. 3d at 86 n.5. Plaintiffs respectfully submit that the Court's judgment on that point was in error, however, because controlling authority requires the agency interpretation to be "promulgated in the exercise of" the agency's authority to "make rules carrying the force of law" in order to warrant *Chevron* deference. *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006). In this case, a decision of only three commissioners lacks the required "force of law."

For example, in *Mead*, the agency in question unquestionably had the authority from Congress to issue regulations bearing the force of law, regulations which would have received *Chevron* deference. *Mead*, 533 U.S. at 226–27, 230, 234 (recognizing agency must engage in notice-and-comment rulemaking for certain rules; noting notice-and-comment rulemaking shows "Congress delegated authority to the agency generally to make rules carrying the force of law"). Nonetheless, because the agency interpretations in question did not carry force of law—even if they would have carried it if issued in another way—the Court found deference to them was inappropriate. *Id.* at 234. It wasn't enough that the agency had delegated authority to make rulings bearing force of law. The presence of notice-and-comment rulemaking or adjudication authority are merely evidentiary points that might lead a court to conclude that a particular agency action has binding effect on third parties and thus has force of law. Where the agency

decision does not bind third parties, however, the agency's power to engage in adjudication or notice-and-comment rulemaking will not imbue the agency interpretation with force of law, and therefore will not afford it *Chevron* deference.

Similarly, here, while the FEC may issue an interpretation of the FECA or FEC regulations bearing force of law, it can only do so by an affirmative vote of four members. A vote of three commissioners is insufficient to endow a decision with force of law, however, and therefore their interpretation never warrants *Chevron* deference. To the extent the Court finds the controlling commissioners interpreted a matter over which the FEC has authority, Plaintiffs respectfully request the Court reconsider its prior decision with respect to *Chevron* deference to three-commissioner statement of reasons.[5]

2. Arbitrary and Capricious, or an Abuse of Discretion

Even if the controlling commissioners' statement contains no legal errors, a court may nonetheless find a dismissal contrary to law if the dismissal was "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161. In conducting this analysis, courts employ the same standard as under the APA. *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 550–51, 551 n.6 (D.C. Cir. 1980) (Wald, J., concurring); *see also CREW I*, 209 F. Supp. 3d at 88. An agency decision will be arbitrary, capricious, or an abuse of discretion where the agency "entirely failed to consider an important aspect of the [relevant] problem" or has "offered an explanation for its decision that runs counter to the evidence before [it]." *CREW I*, 209 F. Supp. 3d at 88 (quoting *Nat'l Ass'n of Home Builders v. Defs. Of Wildlife*, 551 U.S. 644, 658 (2007)).

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[5] It is Plaintiffs' position that the only legal interpretations at issue here are the controlling commissioners' interpretations of the Constitution and of judicial precedent on remand. Accordingly, irrespective of the Court's decision on the deference that may be afforded to a non-majority panel of FEC commissioners, no *Chevron* deference is available here.

"At the very least, '[t]he agency must articulate a rational connection between the facts found and the choice made.'" *Id.* (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys. Inc.*, 419 U.S. 281, 285–86 (1974)). "While a court ought to uphold a decision of less than ideal clarity if an agency's path may reasonably be discerned, the court should also insist on a 'reasonable explanation of the specific analysis and evidence upon which the agency relied.'" *Id.* (quoting *Bluewater Network v. EPA*, 370 F.3d 1, 21 (D.C. Cir. 2004)).

B. The Failure to Act is Unreasonable

The FEC's failure to act on a complaint is evaluated under a slightly different standard. "Where the issue before the Court is whether the agency's failure to act is contrary to law, the Court must determine whether the Commission has acted 'expeditiously,'" *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980), applying "standards generally applicable to review of agency action," *In re Nat'l Congressional Club*, Nos. 84-5701, 84-5719, 1984 WL 148396, *1 (D.C. Cir. Oct. 24, 1984) (per curiam); *accord Dem. Senatorial Campaign Comm. v. FEC*, No. 95-cv-0349 (JHG), 1996 WL 34301203, *3 (D.D.C. Apr. 17, 1996) ("*DSCC*") (examining whether FEC delay was "arbitrary and capricious").[6]

"Factors the Court may consider in making its determination include the credibility of the

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[6] The court in *Common Cause* cited 2 U.S.C. § 437g(a)(3)(A) for this standard. *Id.* Section 437g(a)(3)(A) at the time provided that "[a]ny investigation under paragraph (2)" relating to investigations following a complaint, "shall be conducted expeditiously." *See* 2 U.S.C. § 437g(a)(3)(A) (1976). That specific provision was removed in 1980. *See* Federal Election Campaign Act Amendments of 1979, Pub. L. 96-187 § 108, 93 Stat. 1339 (Jan. 8, 1980). Nevertheless, the FECA still provides the FEC must "conduct investigations and hearings expeditiously." 52 U.S.C. § 30107(a)(9); *see also DSCC*, 1996 WL 34301203, at *4 ("The Act grants the FEC the power to conduct investigations 'expeditiously,' and this provision has been construed as imposing an obligation to investigate complaints expeditiously." (internal citations omitted)); *Rose v. FEC*, 608 F. Supp. 1, 11 (D.D.C. 1984) ("[T]he Court cannot conclude that the absence of such language in this separate provision of the Act relieves the Commission of the obligation to act expeditiously, or gives the Commission discretion to act non-expeditiously.").

allegation, the nature of the threat posed, the resources available to the agency, and the information available to it, as well as the novelty of the issues involved." *Common Cause*, 489 F. Supp. at 744; *see also In re Nat'l Congressional Club*, 1984 WL 148396, at *1. In addition, the Court reviews the FEC's inaction under the factors set forth in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*") (listing factors as (1) a "rule of reason," (2) congressionally approved "timetable," (3) significance of threat posed by unremedied violation, (4) "effect of expediting delayed action" on other agency activities, and (5) "the interest prejudiced by the delay"); *see In re Nat'l Congressional Club*, 1984 WL 148396, *1. While there is no presumption that an action taking longer than 120 days is unreasonable, *Common Cause*, 489 F. Supp. at 742, "some cases can be dealt with in the 120 day period" and delay beyond that time may be unreasonable, *Citizens for Percy '84 v. FEC*, No. 84-cv-2653, 1984 WL 6601, *4 (D.D.C. Nov. 19, 1984) ("If not, we fail to understand why Congress created jurisdiction in this court upon the passage of 120 days from filing of the administrative complaint.").

III. The FEC's New Dismissal is Still Contrary to Law

Remanded to reconsider their interpretation of *Buckley*'s major purpose test that treated *all* electioneering communications as non-political, the controlling commissioners fabricated a multipart test that lets them treat *nearly all* electioneering communications as non-political. Their new interpretation of *Buckley*, however, is unsupported by relevant authority and is based on the same inapposite authority that this Court previously found rendered the dismissal contrary to law. *CREW I*, 209 F. Supp. 3d at 89 (finding controlling commissioners' reliance on *WRTL II* in disclosure context was legal error). In addition to doubling down on their prior legal errors, the controlling commissioners' interpretation contains new errors. Any one of these flaws would

render the test contrary to law. Combined they certainly do.

A. The Controlling Commissioners Again Rely on an Impermissible Interpretation of *Buckley*

On remand, the controlling commissioners were required to come up with a new interpretation of *Buckley* that eschewed their legally erroneous conclusion that all electioneering communications were non-political, and therefore provided grounds to excuse groups from political committee reporting. The new test, arrived at without legal advice from the OGC, was:

> In evaluating major purpose, our starting point is the language of the communication itself. In other words, we look at the ad's specific language for references to candidacies, elections, voting, political parties, or other indicia that the costs of the ad should be counted towards a determination that the organization's major purpose is to nominate or elect candidates. We also examine the extent to which the ad focuses on issues important to the group or merely on the candidates referenced in the ad. Additionally, we consider information beyond the content of the ad only to the extent necessary to provide context to understand better the message being conveyed. Finally, we ascertain whether the communication contains a call to action and, if so, whether the call relates to the speaker's issue agenda or, rather, to the election or defeat of federal candidates.

AR 1767–68. Notably, the controlling commissioners further declared, *ipse dixit*, that, "[w]hile [they] [were] also mindful of the fact that electioneering communications, by definition, must refer to a clearly identified federal candidate; such references, by themselves, do not make the communication electoral." AR 1768. Utilizing that test, they found that nearly all of AAN's electioneering communications were not political, largely because they asked viewers to "call" their representatives to express displeasure about some particular piece of legislation or area of policy, rather than containing an express request to vote against the identified politician. AR 1772, 1773, 1776–78. While the controlling commissioners did the bare minimum to back off from the categorical exclusion that was the basis of the prior remand and to "feign[] compliance with the Court's" judgment, AR 1785 (Statement of Reasons of Comm'rs Ann M. Ravel and

Ellen L. Weintraub), their new interpretation remains contrary to law.

1. The Controlling Commissioners' Impermissibly Relied on the "Inapposite" **WRTL II**

In its September 2016 Judgment, the Court informed the controlling commissioners that "the *WRTL II* framework" that "drew a bold line between express advocacy (and its functional equivalent), which it deemed more regulable, and issue advocacy, which it deemed less so," developed "in the context of an outright *ban* on speech" and thus "is not properly applied in the context of less restrictive *disclosure* requirements." *CREW I*, 209 F. Supp. 3d at 89. The Court told the controlling commissioners that *WRTL II* was simply "inapposite in the disclosure context," and therefore it was legal error for the controlling commissioners to apply *WRTL II* to interpret *Buckley*'s application to political committee reporting. *Id.* at 90, 92.

Despite this admonition from the Court, it is clear that the controlling commissioners based their new test on *WRTL II*. On remand, these commissioners concocted a new multi-part test to supposedly tease out whether an ad exhibited electoral purposes. AR 1767–68. They cite no learned experience or prior judgments for this test. Rather, they cited only one authority for that test: a truncated discussion from *McConnell* about an ad targeting candidate Bill Yellowtail. AR 1768 (*see McConnell*, 540 U.S. at 193 n.78).[7] That authority, however, does not support their newly crafted test interpreting *Buckley*. As the FEC made clear in its motion papers and in its response to the order to show cause, the absence of any cited supportive authority is not a

[7] The statement of reasons also cites the 2007 Supplemental E&J, but only for the point that the FEC's analysis may be "fact intensive" and to state groups may glean guidance on the FEC's application by consulting FEC files. AR 1767. They also cited 52 U.S.C. § 30104(f)(4)(A)(i)(I), though Plaintiffs presume that is a typo as that provision does not exist. *Id.* Rather, the FEC likely meant to cite 52 U.S.C. § 30104(f)(3)(A)(i)(I), but that section only states one quality of an electioneering communication: that it clearly identify a federal candidate. None of this authority supports or is purported to support the test the controlling commissioners outlined.

mistake. The controlling commissioners cited no authority because the Court has already declared *WRTL II*, the sole authority for their test, to be inapposite to the task of interpreting *Buckley*. *See* FEC Br. 38–40, 42 (relying on *WRTL II*'s "functional equivalent" test to dismiss); FEC Opp. To Pls.' Mot. for An Order to Def. FEC to Show Cause 25–27; *CREW v. FEC*, No. 14-cv-1419-CRC (D.D.C. Dec. 12, 2016) (attached as Exhibit 2) (same); *accord* AAN Br. 5.

The controlling commissioners drafted the test to once again distinguish between the "functional equivalent of express advocacy" and "issue ads," the latter a category which they assume, following *WRTL II*, may not be regulated, regardless of those ads' connections to elections and the fact that the regulation at issue here is simply disclosure. FEC Br. 38, 42 ("Some electioneering communications may constitute genuine issue advocacy." (citing *WRTL II*, 551 U.S. at 470)). The controlling commissioners test parrots the distinctions drawn in *WRTL II*: whether (1) "[t]he ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter," (2) "their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger;" and (3) "they do not take a position on the candidate's character, qualifications, or fitness for office." *Compare WRTL II*, 551 U.S. at 470 *with* AR 1767–68.

As this Court previously found, *WRTL II* is "inapposite" in disclosure contexts such as this. *CREW I*, 209 F. Supp. 3d at 90.[8] Accordingly, just as it was legal error for the controlling

[8] Neither the FEC nor AAN make any serious attempt to argue that the Court was wrong in its conclusion. That is because any such argument would lack merit. *WRTL II* considered only a *ban* on speech, subject to strict scrutiny, and drew the issue speech/electioneering speech distinction only to distinguish prior precedent upholding a ban on the latter. *WRTL II*, 551 U.S. at 455–57, 476–77. *WRTL II* did not, and could not, consider whether any electioneering communication would or could be so unrelated to influencing an election that it should excuse a

commissioners to rely on *WRTL II* in the previous case to find none of AAN's electioneering communications could indicate an electoral purpose, it was legal error for the controlling commissioners to again rely on *WRTL II* on remand.

The FEC and AAN argue, however, that this Court did not mean what it said with respect to *WRTL II* and that it was only legal error for the FEC to "exclude[e] *all* non-express advocacy speech from consideration." FEC Br. 40; *see also* AAN Br. 18–19 ("Instead, the Court held the Commission should not read *WRTL II* to require it to find that all electioneering communications are *not* indicative of a major purpose to nominate or elect candidates."). They also emphasize the Court's refusal to adopt a bright-line test in the prior judgment. FEC Br. 36; AAN Br. 16. They further assert that the Court's denial of the motion for an order to show cause means that the dismissal cannot be contrary to law. FEC Br. 40; AAN Br. 11.

The FEC and AAN misinterpret the Court's analysis, however, and attribute to the Court conclusions on questions that the Court expressly stated were not before it in the show cause order. First, while the FEC and AAN attempt to cabin this Court's declaration that *WRTL II* was "inapposite in the disclosure context," *CREW I*, 209 F. Supp. 3d at 90, their assertion is nonsensical. To be sure, the result of that legal judgment was to vacate the particular decision of the controlling commissioners on review: their decision to treat electioneering communications as categorically non-political. *Id.* at 92. Yet neither the FEC nor AAN can explain how a judicial decision that is totally inapposite to disclosure would suddenly become relevant simply because the FEC now applies that authority in the same context to reach a slightly different

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group from reporting under the FECA's political committee rules. That is why, as the Court noted, *Citizens United* "flatly rejected" the argument that *WRTL II* had any application to the FECA's disclosure requirements. *CREW I*, 209 F. Supp.3d at 89.

result. Then, as now, the context is disclosure and *WRTL II* is inapposite.

Second, while the Court did not take up Plaintiffs' suggestion that it declare that all electioneering communications are electoral under *Buckley*—and thereby bar the FEC from excusing an organization from political committee reporting simply because it ran an electioneering communication—it also did not conclude that any particular electioneering communication would or could lack an electoral purpose. *See CREW I*, 209 F. Supp. 3d at 93 (stating the "Court will not go further" and "will refrain from replacing the Commissioners' bright-line rule with one of its own"). Nothing in the Court's order prohibited the controlling commissioners from interpreting *Buckley* to treat all electioneering communications as evidencing an electoral purpose or from finding all of AAN's electioneering communications evidenced that purpose. Nor does anything in the Court's order provide any support for the controlling commissioner's refusal to do either. The Court simply refrained from addressing issues beyond those necessary for it to resolve the question before it. *CREW I* provides no support for the controlling commissioners reliance on *WRTL II* on remand.

Nor did the Court's order on the motion to show cause address whether the controlling commissioner's reliance on *WRTL II* was permissible. As the Court recognized in its order, a request for post-judgment relief presents a different question than posed by the FECA: the post-judgment motion required Plaintiffs to show that the FEC violated the clear and unambiguous directive of the Court. OTSC Order 4. Regardless of the holdings in the September 2016 Judgment, the directive was only for the FEC to reopen the case and to no longer treat all electioneering communications as non-electoral. *Id.* at 5. Because the FEC did that, the Court found that the FEC conformed with the earlier judgment. *Id.* The Court did not address the question of whether the dismissal on remand was contrary to law, including because it

impermissibly relied on *WRTL II*. *Id.* The Court found such questions must be addressed in a new action, like the one here. *Id.*

In sum, while the controlling commissioners attempted to hide their reliance on *WRTL II*, the FEC recognizes that the only possible defense for their concocted test must rely on that authority. *WRTL II*, however, was and remains "inapposite" in the disclosure context relevant to this case. Accordingly, the dismissals rested on impermissible interpretations of law and were contrary to law. *CREW I*, 209 F. Supp. 3d at 90.

2. The Controlling Commissioners' Interpretation Conflicts with Established Case Law

The controlling commissioners' analysis not only relies on inapposite authority, but it conflicts with relevant authority, including the only authority the controlling commissioners cited to support their test: *McConnell*. In an attempt to reconcile their test with that authority, however, they omit relevant portions of that referenced "Yellowtail" ad, and completely ignore other ads the Court previously found to have the purpose of influencing elections.

a. The Controlling Commissioners' Analysis Cannot By Reconciled With *McConnell*

According to the controlling commissioners, the *McConnell* "Yellowtail" ad supports their conclusion because the ad, which *McConnell* recognized evidenced an electoral purpose, "accused Bill Yellowtail of hitting his wife, skipping child support payments, and being a convicted felon." AR 1768; *see McConnell*, 540 U.S. at 193 n.78 (finding that "the notion that this advertisement was designed purely to discuss the issue of family values strains credulity"). They controlling commissioners juxtaposed that electoral ad with AAN's ads, which they asserted omitted such "sharp critique[s] of . . . the candidate's personal behavior" but rather contained "sharp critique[s] of a candidate's position on legislation or public policy." AR 1768.

Yet, in an attempt to manufacture a distinction between the "Yellowtail" ad and AAN's ads, the controlling commissioners omitted significant portions of the "Yellowtail" ad. In addition to criticizing the candidate's behavior, the Yellowtail ad critiqued the candidate's "vote[] against child support enforcement," and asked viewers to "[c]all Bill Yellowtail" and to "[t]ell him to support family values." *McConnell*, 540 U.S. at 193 n.78. Thus, the ad that the Supreme Court found to be political in *McConnell* also contains the same type of legislative critique and the call to action that the controlling commissioners assert render AAN's ads non-electoral. *See* AR 1767, 1770–78.

The other ads analyzed by the Court in *McConnell* further demonstrate the errors in the controlling commissioners' *McConnell* analysis. For example, the Court characterized as quintessentially campaign-related an ad that, while lacking express advocacy, "condemned [candidate] Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 127. Notably, the hypothetical ad, which the *McConnell* Court indicated would be categorized as electoral, omitted any ad-hominem attacks on the candidate's character, *id.*, thus undermining the FEC's claim that such content is a distinguishing feature, *see* FEC Br. 37–38 (noting "Yellowtail" ad, unlike AAN ads, accused candidate of taking "a swing at his wife").

The Court also pointed to real-life examples of ads run by Republicans for Clean Air and Citizen for Better Medicare. *McConnell*, 540 U.S. at 128. The Republicans for Clean Air ad contrasted then-candidates for the Republican presidential nomination Senator John McCain and Governor George Bush on their environmental positions. Statement of Reasons of Commissioners Scott E. Thomas and Danny Lee McDonald 2, MUR 4982 (Apr. 24, 2002), http://bit.ly/2gLglXL (cited by *McConnell v. FEC*, 251 F. Supp. 2d 176, 232 (D.D.C. 2003)

(cited by *McConnell*, 540 U.S. at 128 n.23)). The ad contained no express advocacy, *id.* at 4, and reflected the speaker's purported agenda to "advocat[e] national environmental matters, including pending and proposed federal legislation on clean air issues." First General Counsel's Report 15, MUR 4982 (Dec. 20, 2001), http://bit.ly/2xQtsh4. Thus, under the controlling commissioners' proposed test the ad would be an "issue" ad and thus lack an election-related purpose. The Supreme Court, however, recognized this "so-called issue ad[]" was sufficiently election-related to justify regulation under the FECA. *McConnell*, 540 U.S. at 128, 196.

Similarly, the Court found ads by Citizens for Better Medicare were electoral despite the fact that they would be classified as non-political under the controlling commissioners' proposed interpretation of *Buckley*. Citizens for Better Medicare's stated mission was to "represent[] the interests of patients, seniors, disabled Americans, small businesses, pharmaceutical research companies and many others concerned with Medicare reform," though in truth it was financed by the pharmaceutical industry. *McConnell*, 251 F. Supp. 2d at 546, 608–09 (Kollar-Kotelly, J., concurring). Between September 2000 and the election, the group ran ads that "urg[ed] people to call [the named representatives] and support" proposed policies related to a prescription drug benefit bill. Dep. of Alex Castellanos 65:1–3, *McConnell* v. FEC, No. 02-cv-0582 (D.D.C. Sept. 27, 2002), http://bit.ly/2xagRbO ("Castellanos Dep.") (noting ads "vari[ed] in the different areas" in which they ran) (cited by *McConnell*, 251 F. Supp. 2d at 546). For example, one ad referred to Rep. Ernie Fletcher (R-KY), stated Rep. Fletcher "voted to strengthen and improve healthcare for seniors," then went on to ask viewers to "[c]all Congressman Fletcher and see what you can do to support his prescription drug plan for seniors." *See* The Campaign Finance Institute, Issue Ad Disclosure, Recommendations for a New Approach App. A9 (Feb. 2001), http://bit.ly/2gIkVWK; *see also* Castellanos Dep. at 65:19–22 (referencing "Ardell Miracles"

ad). Even though the ads referenced an "issue" consistent with the speaker's purported agenda and included a call to action to contact the representative and express support—facts that would cause the controlling commissioners to deem these ads non-political "issue" ads—the Court understood the ads were election-related. *McConnell*, 540 U.S. at 128, 196.

There is no way to reconcile the controlling commissioners' interpretation of *Buckley* test with the Court's conclusions about the ads in *McConnell*, and the FEC does not even try to do so. Rather, it focuses on language in the *McConnell* decision stating that some electioneering communications may have "no electioneering purpose." FEC Br. 38 (quoting *McConnell*, 540 U.S. at 206). The FEC lifts the quote from its context, thereby misconstruing the Court's point. First, the Court did not decide whether an electioneering communication could ever lack an electioneering purpose: the quoted language comes from the Court's description of "a matter of dispute between the parties and among the judges on the District Court." *McConnell*, 540 U.S. at 206. The Court did not resolve that question, instead recognizing that, at the very least, "the vast majority of [electioneering communication] ads clearly had such a purpose." *Id.*

Second, the quoted discussion was within the context of the FECA's then *ban* on corporate-and-union funded electioneering communications. *Id.* at 203 ("BCRA § 203's Prohibition on Corporate and Labor Disbursements for Electioneering Communications"). There was some dispute about whether the ban failed strict scrutiny because an electioneering communication might not be "the functional equivalent of express advocacy," and thus the ban would not be narrowly tailored to compelling interests. *Id.* at 206 (holding ban survived strict scrutiny). With respect to disclosure, however, which is not subject to strict scrutiny, the Court found that *all* electioneering communications were sufficiently electoral as to warrant disclosure. *Id.* at 206. The Court recognized that, in the context of corporate and union funded

electioneering communications, that it was appropriate for all such ads to be funded only from a "segregated fund"—then the only means by which a corporation or union could lawfully fund an electioneering communication. *Id.* A "segregated fund" is a type of political committee. *See* 11 C.F.R. § 100.5. Thus, according to *McConnell*, *all* corporate and union funded electioneering communications—even those that might be said to be "genuine issue ads"—would originate from a political committee. 540 U.S. at 206. In no way then does *McConnell* suggest excluding a group from political committee reporting by reason of its creating any kind of electioneering communication, as the controlling commissioners proposed below.[9]

AAN attempts to side step this issue by arguing that the controlling commissioners in fact adopted no test, but merely engaged in a "'holistic,' nuanced, and comprehensive review based on its 'judicially approved case-by-case, fact-intensive approach' to adjudicating political committee status." AAN Br. 9 (quoting AR 1767, 1780). This "know it when they see it" characterization of the controlling commissioners' test similarly fails to permissibly interpret *Buckley*'s major purpose test. First, this Court already stated that it "blinks reality to conclude that many of the ads considered by the commissioners in this case were not designed to influence the election or defeat of a particular candidate in an ongoing race." *CREW I*, 209 F. Supp. 3d at 93. Secondly, by characterizing the controlling commissioners' test as "case by case," AAN's free-wheeling and unpredictable test discards the "objectivity, clarity, and consistency" that the controlling commissioners were attempting and thus AAN fails to fairly describe the analysis

[9] The Court also recognized that someone who wished to communicate an "issue ad[] during [the] timeframes" of an electioneering communication, but who lacked an electoral purpose, would simply "avoid[] any specific reference to federal candidates." *Id.* According to the Court then, someone who ran a qualifying ad in that window and identified a candidate would only do so because they intended to influence the election. *Id.*

below. AR 1768.[10] Third, by regulating electioneering communications, Congress has already declared, and the Courts have agreed, that all ads meeting those qualifications are sufficiently intended to influence elections to warrant disclosure. *See, e.g.*, *McConnell*, 540 U.S. at 196. There is simply no set of facts which would allow the Commission to reject Congress's and the courts' judgment. Finally, as is apparent from the FEC's brief and the total overlap between the controlling commissioners' test and *WRTL II*, the controlling commissioners continue to misinterpret the relevant standard for *Buckley*'s "major purpose" test as one that treats only ads that are the "equivalent of express advocacy" as evidence of the purpose to nominate or elect candidates. FEC Br. 42; *accord* AAN Br. 5; *see also supra* Part III.A.1. Thus, even if one interprets their analysis as purely fact driven, the controlling commissioners continue to aim at the wrong target, rendering it contrary to law. *CREW I*, 209 F. Supp. 3d at 93 (analysis "based" on "an improper legal ground" was contrary to law).[11]

b. Distinguishing Between "Genuine Issue" Ads and Those "Focused on Pending Legislation" is Unworkable.

The distinction that the controlling commissioners' attempt to draw is not only against

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[10] Of course, the test lacks any objectivity, clarity, or consistency. If an ad asking viewers to call their representative to express their views on a policy matter may be deemed election-related, *see McConnell*, 540 U.S at 127–28, 193 n.73, 196, but an ad telling viewers that their member of Congress supports Viagra for rapists and asks the viewers to do something about that "in November" when they are up for reelection is not election-related, AR 1775, no one could predict when their ad may excuse them from political committee reporting and when it will not.

[11] While *Shays* recognized the determination of a group's "major purpose" may "require[e] a very close examination of various activities and statements" through "case-by-case analysis," it did so in context of recognizing the analysis may require the agency's consideration of materials like "public statements," "internal statements of the organization," and "the organization's fundraising appeals"—all communications which may or may not indicate an electoral purpose, depending on their particular facts. 511 F. Supp. 2d at 29. In no way, however, does *Shays* imply that the FEC may appeal to its "case-by-case" analysis to interpret *Buckley* to exclude an organization from political committee reporting because the group runs ads both Congress and the courts understand to be election-related.

binding case law, it is both unworkable and contrary to common sense.

Courts have recognized the inherent "unworkab[ility]" of the controlling commissioners' exercise. *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 188 (D.D.C. 2016), *aff'd* 137 S. Ct. 1204 (2017) (Mem.). A three-judge panel rejected an identical proposed test to distinguish between "genuine issue" electioneering communications "focused on pending legislation" and other ads that could still trigger disclosure. *Id.* at 185, 187. The panel declared any such distinction would be "entirely unworkable" because it would "blink reality to try to divorce speech about legislative candidates from speech about the legislative issues for which they were responsible." *Id.* at 188. The panel noted either type of electioneering communication "triggers th[e] same informational interests" of "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions" held to justify disclosure. *Id.* at 190. Notably, the panel said that any ad "link[ing] an electoral candidate to a political issue," like "pending federal legislation" and "solicit[ing] voters to press the legislative candidate for his position on the legislation in the run up to an election" warrants disclosure because it has the purpose of influencing that election. *Id.* "Providing the electorate with information about the source of the advertisement," the panel found, including information about the ad's financial backers, "will allow voters to evaluate the message more critically and to more fairly determine the weight it should carry in their electoral judgments." *Id.* at 191. The Supreme Court affirmed the panel without dissent. *Indep. Inst.*, 137 S. Ct. 1204; *see also Nat'l Ass'n of Gun Rights, Inc. v. Motl*, No. CV 16-23-H-DLC, 2017 WL 3908078, at *5–*6 (D. Mont. Sept. 6, 2017) (holding electioneering communications, defined similarly to federal law, may constitutionally subject creator to political committee reporting under state law, even if ads were "issue advocacy").

Both the panel and the Supreme Court were right to reject this nonsensical distinction. The controlling commissioners assert without justification or explanation that the qualities that make an ad an electioneering communication cannot be sufficient to conclude an ad has the purpose of influencing an election because such an ad might mention an "issue." *See* AR 1768. Yet it would be absurd to say that an ad loses its electoral purpose when it discusses an "issue" that gives an actual reason for the voters to vote in a particular way. It is not surprising that an ad that seeks to persuade a voter to vote for or against a candidate would point to the legislative or policy effects of that vote as the reason to do so. Indeed, even express advocacy ads which are indisputably for the purpose of influencing elections make similar appeals. *See, e.g.*, AR 1483 (discussing AAN's express advocacy ads, which, like their electioneering communications, identified legislative issues important to AAN and the targeted the candidate's record on them as the reason to vote for or against a candidate); American Action Network Misleads on Health Care and Taxes in Attack on Keating, POLITICAL CORRECTION (Oct. 19, 2010), http://bit.ly/2f4pvP5 (providing transcript of AAN express advocacy ad targeting Democratic candidate Bill Keating for "want[ing] to raise taxes on small businesses," "support[ing] the trillion dollar health care overhaul, raising taxes on families by 525 billion, and cutting Medicare for seniors by half a trillion dollars"); AAN misleads Again, This time About Taxes in Pennsylvania, POLITICAL CORRECTION (Oct. 20, 2010), http://bit.ly/2w8hChc (providing transcript of AAN express advocacy ad targeting Democratic candidate Bryan Lentz for "rais[ing] taxes in Pennsylvania"); American Action Network's Stale Attack on Causey, POLITICAL CORRECTION (Oct. 20, 2010), http://bit.ly/2xbCqJN (providing transcript of AAN express advocacy ad targeting Democratic candidate Chad Causey for supporting "wasteful stimulus [and] the trillion-dollar health care takeover that raised taxes").

In the end, the controlling commissioners rely on inapposite authority to interpret *Buckley* as implementing a test that conflicts with binding precedent and proves entirely unworkable. The Court should once again reject their interpretation as impermissible. On remand, the Court should clarify to the agency that the permissible interpretation of *Buckley*'s "major purpose" test treats a group's electioneering communications in the same way it treats express advocacy, just as Congress intended and the Court upheld, *McConnell*, 540 U.S. at 126–27, 196, and that it "fulfill[s] the purposes of the Act" to require comprehensive disclosure of organizations that meet the statutory qualifications of a political committee, *Buckley*, 424 U.S. at 79, notwithstanding the organization's extensive spending on electioneering communications.

B. The Commissioners' Interpretation of *Buckley* is Arbitrary and Capricious

In addition to the various legal errors involved in the controlling commissioners' interpretation of *Buckley*, their interpretation and the application of that interpretation are also arbitrary and capricious. This is because the controlling commissioners look only to context identified by AAN (which, uncoincidentally, all pointed in favor of a non-electoral purpose) while ignoring equally, if not more, relevant facts that would tend to show the ads were electoral in purpose. The agency's "fail[ure] to consider an important aspect of the [relevant] problem" renders the decision arbitrary and capricious. *Nat'l Ass'n of Home Builders*, 551 U.S. at 658.

First, the controlling commissioners ignore the fact that AAN's purported policy ads were precisely targeted to the electorate of at-risk Democrats soon to be up for election, while ignoring any officials not up for election or Republicans. Its three electioneering communications referencing Senate candidates ran in a toss-up state (Washington) and two states that either initially or in the end only leaned Republican (Wisconsin, New Hampshire). *See* Election 2010: Senate Balance of Power, RASMUSSEN REPORTS (Nov. 1, 2010),

http://bit.ly/2fcd0k0. AAN's ads referencing House candidates similarly were communicated only to voters in tightly contested districts. *See* Battle for the House, REAL CLEAR POLITICS, http://bit.ly/2xQdODq (listing as "Toss Up" or "Leans" Republican or Democratic races for PA-12 (Critz), OH-6 (Wilson), OR-5 (Schrader), WI-8 (Kagen), IN-2 (Donnelly), CO-7 (Perlmutter), NM-1 (Heinrich), VA-11 (Connolly), VA-5 (Perriello), SD-AL (Herseth Sandlin), CT-5 (Murphy), CT-4 (Himes), MI-7 (Schauer), NV-3 (Titus), VA-9 (Boucher), WV-1 (Oliverio), NH-2 (Kuster), and MN-1 (Walz)).[12] Nor does the record show any ad by AAN advocating its preferred policy positions after the election and during the lame duck session, even though a voter's call would have been particularly timely then. AAN's selective targeting is simply incompatible with its claim, and the FEC's conclusion, that the ads' purposes were solely to inform citizens or ask voters to lobby their representatives.

The ads AAN ran in Virginia are instructive. While AAN ran ads against three Virginia Democratic congressmen up for re-election, AR 1773, 1777 (discussing "Back Pack" ad run against Reps. Gerry Connolly and Tom Perriello and "Read This (Boucher)" ad run against Rep. Rick Boucher), the record shows no AAN ad asking Virginians to contact their senators, neither of whom were up for election that year but who would nevertheless be voting on any legislation arising in November. Nor does the record show AAN asked Virginians to contact any of the state's other House members, all of whom would be voting in the lame duck session, including

[12] The Court may consider this material, even where outside the record, because this material is relevant to the proper legal interpretation of *Buckley*, FED. R. EVID. 201 notes ("In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion."), and the material shows "whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision," *Nat'l Treasury Emps. Union v. Hove*, 840 F. Supp. 165, 168 (D.D.C. 1994), *aff'd*, 53 F.3d 1289 (D.C. Cir. 1995); *accord Oceana, Inc. v. Locke*, 674 F. Supp. 2d 39, 45 (D.D.C. 2009) (court may take notice of extra-record evidence to see if agency "failed to examine all relevant factors").

Republican Reps. Rob Wittman, Randy Forbes, Bob Goodlatte, Eric Cantor, and Frank Wolf, and Democratic Reps. Robert Scott and Jim Moran. Notably, the two Democratic congressmen ignored by AAN handily won their reelections, while the three targeted by AAN were in close races. *See* FEC, Official Election Results for the House of Representatives: 2010 U.S. House Campaigns 142–43, http://bit.ly/2w8471a; Battle for the House, REAL CLEAR POLITICS, http://bit.ly/2vNmxc0. This context indicates AAN chose its targets not for their openness to persuasion but for their risk of electoral defeat, and viewers of AAN's ads surely would have noticed which of their representatives AAN chose to highlight.[13]

AAN for its part has no explanation for this unambiguous electoral targeting. Rather, it meekly points out that an ad targeting an individual not up for election would not qualify as an electioneering communication. AAN Br. 23. Of course, if AAN ran an ad identifying a Republican officeholder before the election or a Democratic officeholder in an uncompetitive race, and asked viewers to contact them, that ad *would* qualify as an electioneering communication. But the record indicates no such ads by AAN. The record is also devoid of *any* ad, whether or not it constituted an electioneering communication, discussing AAN's purported policy proposals after the election, or asking viewers to contact representatives not up for

[13] The context of AAN's other ads is similar. In Connecticut, for example, AAN ran ads targeting two Democratic congressmen—Reps. Chris Murphy and Rep. Jim Himes, AR 1775—but the record shows no ad asking Connecticut voters to contact their other representatives, even though they would vote in any lame duck session and were covered by the same broadcast markets. FCC, Coverage Map WTIC-TV (attached as Exhibit 3) (showing coverage of WTIC-TV, station on which AAN ran its ads); Mark Pazniokas, Fox Affiliate bans ad attacking Murphy, CT MIRROR (Oct. 26, 2010), http://bit.ly/2jFkfGb (discussing AAN's ad against Rep. Murphy running on WTIC). Notably, the three other incumbent House members, all Democrats, were in safe seats, *see* Official Election Results 59 (showing election results of 61.25%, 59.86%, and 65.06%), and the sitting Senator, Chris Dodd, was retiring, *see* Chris Cillizza, Connecticut Sen. Christopher Dodd won't seek reelection, will retire at end of term, WASH. POST (Jan. 6, 2010), http://wapo.st/2xbH6iQ.

election. AAN's apparent lack of interest in lobbying individuals not up for reelection—a lack of interest that would be clear to viewers who would notice the choice of officeholders AAN identified—demonstrably proves the purpose behind the ads was electoral. Yet the controlling commissioners' test fails to even consider these facts or treat them as relevant.

Also given a cursory treatment by the controlling commissioners were the unnecessary attacks on the candidates' records, which are inexplicable if the ads were actually focused on legislative issues. AAN's ads not only (purportedly) asked viewers to lobby their representative to push for some vote, but those same ads also informed viewers that the representative, a candidate running for reelection, opposed that position, previously took highly criticized actions in opposition to that position, and wanted to further harm the voters by acting contrary to that position in the future. *See, e.g.*, AR 1771, 1773 (discussing AAN's ads accusing candidates of "spen[ding] nearly eight hundred billion on the wasteful stimulus," "load[ing] our kids up with nearly eight hundred billion in wasteful stimulus spending," and "spen[ding] the shirt of our backs"; and further informing the voters that the candidate "wants to raise taxes," "wants to pile on more spending," and "wants to strip [his constituents] bare with more spending"). A viewer confronted with such a characterization of their elected official would reasonably conclude that they were not open to changing their minds, and that the only way to effect the change sought was to vote the official out of office "in November." The controlling commissioners assert such personal and vitriolic attacks on a candidate's qualities are unrelated to elections, but provide no justification for that conclusion. *Cf. McConnell*, 540 U.S. at 170, n.64 (finding ads which "promote," "attack," "support" or "oppose" a candidate are electoral).

Nor do the controlling commissioners adequately explain the ads' constant reference to "in November"—the month of the upcoming election. As Commissioners Ravel and Weintraub

recognized, even with the terse references to legislative call to actions in AAN's ads, "[n]ot one voter in a thousand would have been aware that Congress might possibly be going into a lame-duck session in November after the election. Not one in a *million* would have thought the use of 'November' in that context would be *best understood* to refer to a lame-duck congressional session instead of Election Day." AR 1788. Yet the controlling commissioners still concluded the ads' reference to "November"—but never any other month—do not communicate an electoral purpose. They do so despite the fact the various identified legislative issues were not confined to November. *Compare* AR 1776 (finding ads related to repeal of Obamacare) *with* AR 1774 (citing news article discussing repeal efforts occurring in the summer of 2010). Moreover, they do so even though some of the issues did not even arise in November. For example, the sole source for their conclusion that the health care repeal efforts were targeted at the November lame-duck session is a news article discussing repeal efforts in the summer. AR 1769 (citing Paul Jenks, Health Overhaul Celebrations Continue, CQ HealthBeat (Sept. 22, 2010) (attached as Exhibit 4) (discussing bills from March)). Indeed, the referenced legislation, H.R. 4903, AR 1775, was dead by April and was never considered in November. *See* H.R. 4903, LIBRARY OF CONGRESS, http://bit.ly/2yl9xIj. In sum, the controlling commissioners simply do not explain why a viewer would ever interpret the ads as an appeal to lobby for a highly unlikely outcome—Democrats voting to repeal their signature legislative achievement, Obamacare—rather than a clear message to do the obvious: to vote against the named candidate.

Lastly, in looking at the "language of the communication," AR 1767, the controlling commissioners ignored other relevant portions of a television communication: the auditory and visual aspects of that ad. AAN's videos often included grainy images of the referenced candidate and ominous music, and messages were conveyed in disapproving tones. *See*

http://bit.ly/2wBCTAg. Any viewer would understand those cues indicated that the official in question was unworthy of office, yet the controlling commissioners ignored them without explanation or justification.

These facts all demonstrate that the controlling commissioners simply cherry picked information, supplied by AAN, that they felt might let them reach their predetermined goal: excusing AAN from political committee reporting. Indeed, their analysis was so rushed that it is rife with basic errors, casting doubt on the integrity of their inquiry. They again looked to the lifetime expenditures of the group. AR 1779. They completely missed one of AAN's ads, despite it being explicitly identified in Plaintiffs' administrative complaint. AR 1484 (discussing Perlmutter "Secret" ad costing $725,000). They also ignored $1.1 million that AAN reported to the IRS as political spending above-and-beyond their spending on express advocacy. *Compare* AR 1598 *with* AR 1779. AAN asserts that the controlling commissioners did not need to consider it because the IRS defines political activity differently than does the FEC, and because the controlling commissioners belatedly considered $1.8 million in AAN's electioneering communications to be political. AAN Br. 25. Yet AAN does not actually assert that the additional $1.1 million it reported to the IRS as political spending is part of that $1.8 million. The controlling commissioners have no idea if that $1.1 million is relevant to AAN's electoral spending because they never bothered to ask. Their "entir[e] fail[ure] to consider an important aspect of the problem" renders their conclusion arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

IV.

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B.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request this Court deny the FEC's and AAN's motions for summary judgment, once again find the FEC's dismissal of Plaintiffs' complaint against AAN was contrary to law, and to find that the FEC's failure to act on Plaintiffs' complaint against AJS was contrary to law.

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